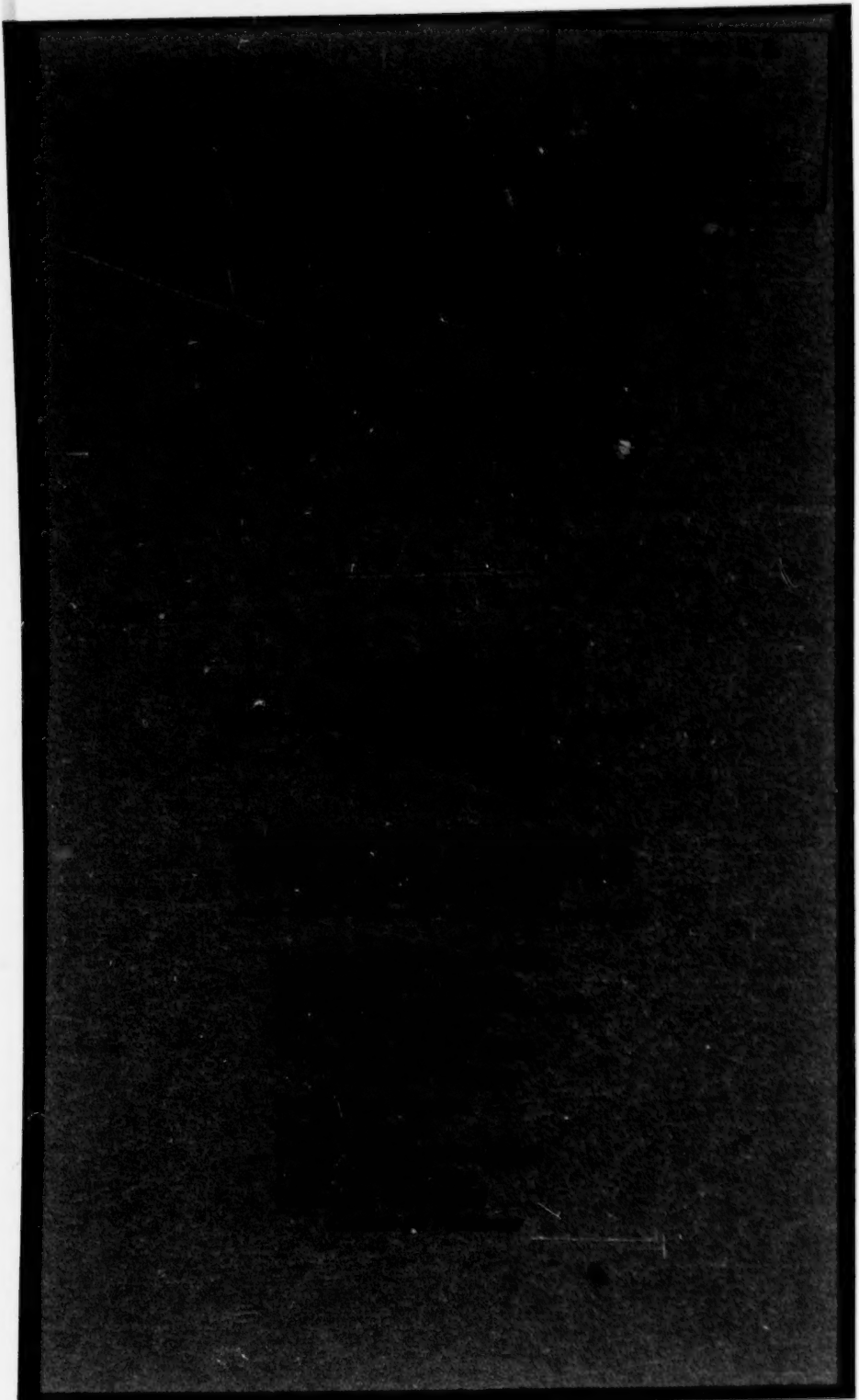

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SUPREME COURT OF THE UNITED STATES

No. _____

UNITED TRANSPORTATION UNION,

Petitioner,

v.

SEYMON B. HARRISON
and
NORFOLK AND PORTSMOUTH BELT LINE
RAILROAD COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE FOURTH CIRCUIT COURT OF APPEALS

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the United Transportation Union, hereby petitions for a writ of certiorari to review the decision of the Fourth Circuit Court of Appeals made on December 5, 1975 which affirmed the decision of the District Court, and in addition, remanded the cause to the District Court for a determination of attorney's fees to be awarded to Seymon B. Harrison's attorney.

OPINIONS BELOW

The Fourth Circuit Court of Appeals' opinion decided on December 5, 1975 is appended hereto in the appendix. The District Court made no written opinion. The Judgment of the District Court is appended hereto in the appendix. The opinion of the Fourth Circuit has not been officially reported at this time.

JURISDICTION

The order sought to be reviewed is the opinion decided on December 5, 1975. No petition for rehearing was made nor was there any extension granted to file this petition for certiorari. The statutory provision believed to confer jurisdiction in this Court to review the judgment in question is 28 U. S. C. Sec. 1254 (1). The District Court had jurisdiction pursuant to the provisions of 28 U. S. C. Sec. 1337.

QUESTIONS PRESENTED FOR REVIEW

1. Can a Union be held responsible for a Union member's lost wages in an unfair representation suit when the Union member was suspended from his employment by his employer and the Union did not encourage, participate or otherwise cause the suspension of its Union member?

2. In an unfair representation suit under the Railway Labor Act can a Union member recover attorney's fees from the Union especially where the jury made an award of punitive damages against the Union?

STATUTE INVOLVED

There are no statutes directly involved. The petitioner and respondents were subject to the Railway Labor Act, 45 U.S.C. Sec. 151 et seq.

STATEMENT OF THE CASE

A. Statement Of Material Proceedings

Seymon B. Harrison (hereinafter referred to as Harrison) filed a complaint against the Norfolk and Portsmouth Belt Line Railroad (hereinafter referred to as the Belt Line), the United Transportation Union (hereinafter referred to as the UTU), and Local 854 of the United Transportation Union, in the Federal District Court in Norfolk alleging that the defendants conspired in the handling of Harrison's grievance. Harrison also alleged that the Local 854 and the UTU unfairly represented him. Harrison sought compensatory and punitive damages. Jurisdiction in the District Court was based upon the duty of the Belt Line to bargain in good faith under the Railway Labor Act and the duty of the UTU and Local 854 to fairly represent its Union members. See 28 U.S.C. §1337. Prior to trial, Harrison dismissed Local 854 as a party defendant. The Court, after Harrison rested, directed a verdict for the Belt Line holding as a matter of law that there was no evidence of any conspiracy or collusion between the Belt Line and the UTU. The jury determined that the UTU unfairly represented Harrison and awarded Harrison $1,570.00 in compensatory damages for lost time and $6,000.00 in

punitive damages. The defendant, UTU, moved for the entry of judgment notwithstanding the verdict and in the alternative moved for a new trial. The District Court after argument entered judgment against the UTU for $1,570.00 in compensatory damages and $6,000.00 in punitive damages. (See Judgment Order Appendix Page 1A). The District Court did not award Harrison attorney's fees as asked for. The UTU appealed the decision of the District Court. Harrison filed a cross appeal contending that the District Court erred in dismissing the Belt Line as a defendant and in denying him attorney's fees. The Fourth Circuit Court of Appeals in a written opinion dated December 5, 1975 affirmed the decision of the District Court and in addition, awarded Harrison attorney's fees in an amount to be determined by the District Court. (See Opinion Appendix Page 3A). Page references to facts will be made to the Joint Appendix filed in the Fourth Circuit unless otherwise designated.

B. Facts

Seymon B. Harrison was a conductor with the Belt Line Railroad. A dispute developed between Harrison and Lassiter, a superior with the Belt Line as to the manner in which Harrison was performing his work. Harrison told Lassiter "that he was the conductor on the job and would tell the brakeman what to do" (41A). Lassiter told Harrison several times to be in his office at 8:30 a.m. the next morning. Harrison didn't think Lassiter ordered him to be in the office and did not report to Lassiter's office the next morning. Harrison was then held out of

service by the Belt Line (49A) and was charged with being insubordinate on August 18th, 1970 (violation of Rule 427) and of failing to obey an order of a superior on August 19, 1970 (violation of Rule 554).

A hearing was held to determine whether Harrison violated the rules as alleged by the Belt Line. The UTU represented Harrison at the investigative hearing and Harrison was pleased with the representation. The Belt Line concluded that Harrison violated both rules as charged and suspended Harrison without pay for sixty days. Harrison lost $1,570.00 in wages as a result of his sixty days suspension. The UTU then filed a time claim for Harrison objecting to Harrison's suspension and requesting that Harrison be reinstated and paid for all time lost (58A, 347A, 348A). The Belt Line denied the claim of Harrison (354A). The UTU met with the Belt Line again on December 21, 1970 in an effort to get the Belt Line to lift the suspension of Harrison on a leniency basis (365A). The Belt Line declined to change its decision and stated on December 22, 1970 that the suspension of sixty days was most lenient (235A).

The UTU then had sixty days to notify the Belt Line that there would be an appeal of the Belt Line's decision. On February 11, 1971, the UTU notified the Belt Line that its decision was not acceptable and would be appealed (237A, 395A). The UTU then had one year to file an appeal with either a Public Law Board or the First Division of the National Railroad Adjustment Board (73A). A General Chairman of the UTU pursuant to the UTU Constitution

properly convened a subcommittee on March 15, 1971 to review Harrison's case to see whether the UTU would carry Harrison's claim to a Public Law Board or to the First Division of the National Railroad Adjustment Board. The subcommittee concluded that Harrison's claim was without merit and did not warrant the further spending of UTU funds (307A, 397A). The UTU Constitution provided that Harrison's Local Chairman and the Secretary of the Local Union should be notified of the decision of the UTU not to pursue Harrison's claim. Evidence did show that neither the Local Chairman nor the Secretary of Harrison's local was notified of the UTU's decision of not to appeal or progress Harrison's case. The UTU produced evidence that this failure to notify the Local Chairman and Secretary was due to inadvertence.

On April 21, 1971, the officials of both the Belt Line and the UTU met to discuss on a leniency basis the claim of Howard Gray, a Belt Line employee who had been fired for fighting and abusive language. The Belt Line then decided to reinstate Gray on a leniency basis because of his past good record, because he had apologized, because his family needed to have him working and because Gray had been out of work for over nine months. The Belt Line advised the UTU that Harrison's suspension would not be lifted on a leniency basis. The UTU then advised the Belt Line that Harrison's case would not be progressed further. Harrison did admit into evidence a memorandum from Morrison, the President of the Belt Line, which stated "Conductor

Howard Gray, Jr. will be reinstated..... provided the UTU does not further progress... the claim of S. B. Harrison". The memorandum of Morrison also provided that Harrison's claim would not be progressed until too late to do so on account of time limit (253A, 284A). The UTU maintained that there was no trade, that each case was discussed on its merits, and that it had already been decided not to pursue Harrison's claim. Harrison did not receive notice that his claim was not being appealed until March of 1972 and then was advised by the Belt Line that it was to late to progress his claim (74A). Harrison then filed suit against the Belt Line and the UTU.

REASONS FOR GRANTING WRIT

There was no evidence that the UTU encouraged, participated or otherwise caused the suspension of Harrison for sixty days. Harrison has never claimed or intimated that the Union was responsible for him being suspended. Huddle, the Superintendent of the Belt Line, suspended Harrison for sixty days because of Harrison being insubordinate on the night of August 18th and failing to report to Lassiter's office on the morning of August 19th. Harrison lost $1,570.00 in wages because of this sixty day suspension. The UTU objected to the Trial Court permitting the jury to consider whether the UTU should be responsible for Harrison's sixty days of lost wages since the UTU was not the cause of Harrison being suspended (15A, 26A, 27A).

The jury found for Harrison and ordered the UTU to pay Harrison's lost time. The

Fourth Circuit Court of Appeals agreed that the UTU should pay Harrison's lost time. The decision of the Fourth Circuit Court of Appeals ordering the UTU to pay for Harrison's lost time is contrary to the decisions of this Court and the decisions of other Circuit Courts of Appeal. (Note: Circuit Judge Winter dissented and reasoned that the UTU should not be responsible for Harrison's lost time, see appendix page 17A).

In Vaca v. Sipes, 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967), the Supreme Court of the United States held that a Union could not be held liable for compensatory damages in the nature of employee lost wages by holding:

> "May an award against a Union include, as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the Union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages..." The governing principle then, is to apportion liability between the employer and the Union according to the damages caused by the fault of each. Thus damages attributable solely to the employer's breach of contract should not be charged to the Union...." In this case, even if the Union had breached its duty, all or almost all of Owens' damages would

BLEED THROUGH

still be attributable to his allegedly wrongful discharge by Swift". See Vaca v. Sipes, supra, page 197.

The Supreme Court concluded that damages attributable solely to the employer's breach of contract should not be charged to the Union even if the Union breached its duty of fair representation.

This principle in Vaca was reaffirmed by the Supreme Court again in a case involving a railroad employee under Railway Labor Act. In Czosek v. O'Mara, 397 U.S. 25, 90 S. Ct. 770, 25 L. Ed. 2d 21 (1970), this Court again held that a Union can be responsible for only those damages that flowed from its own conduct.

"Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the Union and a subsequent discriminatory refusal by the Union to process grievances based on the discharge, damages against the Union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance added to the difficulty and expense of collecting from the employer". See Czosek v. O'Mara, supra, 29.

The Fourth Circuit justified the departure from Vaca, supra, and Czosek, supra, because Harrison did not have a cause of action against the Belt Line for wrongful suspension (see Andrews v. Louisville and

Nashville Railroad Company, 406 U. S. 320 32 L. Ed. 2d 95, 92 S. Ct. 1562 (1972) and because Harrison never had an opportunity to process the grievance himself. Of course, Harrison never sued the Belt Line here for wrongful suspension even though he did have a right to sue the Belt Line for wrongful suspension. (See Schum v. South Buffalo Railway Co., 496 F. 2d 328 (Second Cir. 1974). In addition, the Belt Line had an obligation to bargain in good faith under the Railway Labor Act and the Belt Line could have been held responsible for Harrison's lost time if Harrison proved the Belt Line failed to bargain in good faith. The distinction made by the Fourth Circuit that a Union would not be responsible for lost wages by arbitrarily refusing to process a grievance if it notified the member that it was not going to process the grievance, and that the Union would be responsible for the lost wages if it arbitrarily refused to process a grievance and failed to notify the member of its refusal is not valid. It is submitted that under the Supreme Court decisions that regardless of the nature of the unfair representation, a Union is not liable for lost time caused by suspension if it did not participate or cause the suspension.

A number of Circuit Courts of Appeal have followed the Vaca and Czosek decisions and have not held a Union responsible for the lost time of a Union member even where the Union unfairly represented its employee provided the Union did not encourage, or participate in the suspension of the employee. In De Arroyo v. Sindacato De Trabajadores

Packing House AFL-CIO, 425 F 2d 281 (First Cir. 1970) cert. den. 400 U. S. 877, the plaintiffs were discharged employees and sought damages from the Union for failing to handle their claims. The First Circuit Court of Appeals concluded that there was sufficient evidence to conclude that the Union acted arbitrarily in refusing to process their grievances. However, the First Circuit held that where there is no suggestion that the Union participated in the discharge, the employer must pay the entire amount of lost earnings. See N. L. R. B. v. Local 485 Int. U. of Electrical R & M Workers, 454 F 2d 17 (2nd Cir. 1972) where the Second Circuit refused to hold a Union responsible for back pay of a Union employee where the Union acted arbitrarily in refusing to process the employee's grievance. In St. Clair v. Local U. No. 515 of Int. Bro. of Teamsters, etc., 422 F 2d 128 (Sixth Cir. 1969), the Sixth Circuit Court of Appeals ruled that the damages caused by a Union's breach of duty to take all available steps to remedy a employee's grievance is virtually de minimis and that the claim for back pay would be attributable to the wrongful discharge by the employer. The Eighth Circuit in Richardson v. Communication Workers of America, 443 F 2d 974 (8th Cir. 1971), cert. denied 414 U. S. 818, held that the employer and not the Union is responsible for the back pay of an employee wrongfully discharged provided the Union did not cause the discharge. The Eighth Circuit reached this result where the Union acted arbitrarily and had failed to process the employee's grievance. Finally, the Tenth Circuit in Woods v. North American

Rockwell Corporation, 480 F 2d 644 (10th Cir. 1973) held that a Union is not responsible for damages attributable to the employer's breach.

In summary, the Supreme Court of the United States and a number of Federal Circuit Courts of Appeal have consistently held that a Union is not responsible for the lost time of its Union members where the Union did not encourage or participate in the suspension of the employee which caused the lost time. The reasons advanced by the Fourth Circuit to depart from these decisions were not proper. Harrison did have a remedy and could have alleged that the Belt Line was responsible for his lost time on account of the Belt Line's wrongful suspension. See Schum v. South Buffalo Railway Co., supra.

The District Court determined in its discretion not to award attorney's fees. An award of attorney's fees lies within the sound discretion of the Court. See Bell v. School Board of Powhatan County, Virginia, 321 F. 2d 494 (4th Cir. 1965); Rolax v. Atlantic Coast Line R. Co., 186 F 2d 473 (4th Cir. 1951). The Fourth Circuit concluded that the District Court should have awarded attorney's fees without any finding that the District Court abused its discretion. According to Federal law, attorney's fees will only be awarded when there are overriding considerations which indicate the need for an award of attorney's fees. This Court in Fleischmann v. Maier Brewing Co., 386 U.S. 714, 18 L. Ed. 2d 475, 87 S. Ct. 1404, recognized the general rule that attorney's fees are not ordinarily recoverable in the absence of statute or

enforceable contract providing for them. Harrison's suit against the UTU involved the common law duty of a Union to adequately and fairly represent its members. Neither the Railway Labor Act nor any other Federal statute authorizes the recovery of attorney's fees in an unfair representation suit even though a Union member has had the right to be fairly represented since the development of Unions and collective bargaining. There is no contract to which Harrison can point to for an award of attorney's fees. The doctrine of Fleischmann, supra, was further expanded in Mills v. Electric Auto Site Co., 316 U.S. 375, 24 L. Ed. 2d 593, 90 S. Ct. 616 (1970) where this Court permitted an award of attorney's fees where a party created a common fund from which others may benefit. Harrison has not created a common fund from which others may benefit here since the entire award will go to Harrison.

The Fourth Circuit Court of Appeals concluded that the recent decision of Hall v. Cole, 412 U.S. 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973) warranted an award of attorney's fees to Harrison. It is submitted that the Fourth Circuit was wrong in its application of Hall v. Cole, supra, to an unfair representation suit where the jury made an award of punitive damages. In Hall v. Cole, supra, the plaintiff, a Union member, brought suit under Section 102 of the Labor Management Reporting and Disclosure Act of 1959 to vindicate his right of free speech. Harrison was not seeking in this case to protect any rights guaranteed to him by the Labor Management Reporting and Disclosure Act. Although Hall v. Cole, supra,

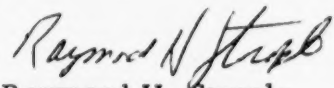
recognized the right to award an attorney's fee where there had been bad faith conduct, none of the cases cited indicated that such an award was proper where the plaintiff had already been awarded punitive damages for bad faith conduct. In those cases authorizing an award of attorney's fees for bad faith conduct, there had not been an award of punitive damages. See Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 19 L. Ed. 2, 1263, 88 S. Ct. 964 (1968) ; Vaughan v. Atkinson, 369 U.S. 527, 8 L. Ed. 2d 88, 82 S. Ct. 997 (1962); Bell v. School Board of Powhatan County, supra; Rolax v. Atlantic Coast Line R. Co., supra. Finally, Hall permitted an award of attorney's fees since the plaintiff through litigation conferred upon other Union members a common benefit without the Union members paying for it. However, the common benefit theory is not applicable here. There has been a "fee shifting" here and the Union members have paid for the common benefit i. e. the vindication of the right to be fairly represented by having to satisfy the punitive damage award.

In conclusion, an award of attorney's fees should not be permitted in an unfair representation suit under the Railway Labor Act where the jury has awarded punitive damages. The Fourth Circuit's decision awarding Harrison attorney's fees is an unjustified extension of established Federal law which permits an award of attorney's fees only when there are overriding considerations which indicate a need for an award of attorney's fees.

CONCLUSION

For the reasons heretofore stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

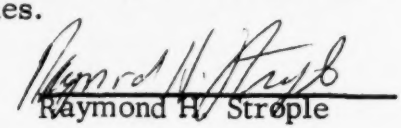


Raymond H. Strople

Raymond H. Strople, Esquire
Willard J. Moody, Esquire
Moody, McMurran and Miller, Ltd.
Post Office Box 1138
Portsmouth, Virginia 23705

CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari in the case of the United Transportation Union v. Seymon B. Harrison and Norfolk and Portsmouth Belt Line Railroad Company were deposited to John M. Ryan, One Commercial Place, Norfolk, Virginia 23510, counsel of record for Seymon B. Harrison, and William E. Rachels, Jr., One Commercial Place, Norfolk, Virginia 23510, counsel of record for the Norfolk and Portsmouth Belt Line Railroad Company, on the 24th day of February, 1976. It is further stated that the petition has been served on all parties.



Raymond H. Strople

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. _____

UNITED TRANSPORTATION UNION,
Petitioner,

v.

SEYMON B. HARRISON
and
NORFOLK AND PORTSMOUTH BELT LINE
RAILROAD COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

SEYMON B. HARRISON,

Plaintiff,

v.

CIVIL ACTION NO.
484-72-N

UNITED TRANSPORTATION UNION,
and NORFOLK AND PORTSMOUTH
BELT LINE RAILROAD COMPANY,

Defendants.

FINAL JUDGMENT ORDER

This action came on for trial before the Court and a jury, Honorable Walter E. Hoffman, District Judge, presiding, and the Court having directed a verdict for defendant, Norfolk and Portsmouth Belt Line Railroad Company, at the conclusion of plaintiff's evidence, and the issues having been duly tried as to the remaining defendant, United Transportation Union, and the jury having duly rendered a verdict for plaintiff and against defendant, United Transportation Union, in the sum of $6,000.00 punitive damages and $1,570.00 compensatory and the defendant, United Transportation Union, having moved to set aside the verdict, and for judgment in favor of the said defendant notwithstanding the verdict or in the alternative for a new trial and the Court having denied the said motion;

It is ORDERED, ADJUDGED and DECREED that the plaintiff, Seymon B. Harrison, recover of the defendant, United Transportation Union, the sum of $6,000.00 in punitive damages and $1,570.00 in compensatory damages. Defendant has pending a decision on its post-trial motions, stipulated that interest at six percent shall run from the date of the jury verdict, June 19, 1973, until paid; plaintiff to recover further taxable costs incurred herein.

The Court notes that the plaintiff in his Complaint seeks equitable relief in the form of an injunction against discriminatory conduct, reinstatement without penalty on applicable seniority lists, etc. and the expungement of any record of the discipline that was alleged in this action. Plaintiff, as equitable relief, also seeks attorney's fees and the Court on motion and over defendant Union's objections permitted an amendment of plaintiff's Complaint specifically requesting same. Having duly considered the evidence presented and the argument of counsel, with regard to said equitable relief,

It is further ORDERED, ADJUDGED and DECREED that said equitable relief be and the same hereby is denied, plaintiff's exceptions noted.

It is further ORDERED, ADJUDGED and DECREED that the enforcement of said judgment of the Court be stayed provided the United Transportation Union perfects its appeal as required by law.

Walter E. Hoffman
United States District Judge

Norfolk, Virginia
April 29, 1974

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 74-1737

SEYMON B. HARRISON,	Appellee,
versus	
UNITED TRANSPORTATION UNION,	Appellant,
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY,	Defendant.

NO. 74-1738

SEYMON B. HARRISON,	Appellant,
versus	
UNITED TRANSPORTATION UNION and NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY,	Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk, Walter E. Hoffman, Senior District Judge

---

Argued February 3, 1975 Decided December 5, 1975

Before HAYNSWORTH, Chief Judge, and WINTER and FIELD, Circuit Judges

---

John M. Ryan (Vandeventer, Black, Meredith and Martin on brief) for Appellee in No. 74-1737 and for Appellant in No. 74-1738; Raymond H. Strople (Willard J. Moody and Moody, McMurran and Miller on brief) for Appellant in No. 74-1737; William E. Rachels, Jr., (Wilcox, Savage, Lawrence, Dickson and Spindle on brief) for Appellees in No. 74-1738

PER CURIAM:

Seymon B. Harrison, a conductor on the Norfolk and Portsmouth Belt Line Railroad (Belt Line), sued the railroad and United Transportation Union (UTU) and Local 854 of UTU. He dismissed the suit against Local 854 before trial. The complaint alleged that Belt Line and UTU had illegally conspired in the handling of Harrison's grievance that he was improperly suspended for sixty days for purported insubordination and failure to obey an order of his superior. In a jury trial, the district court directed a verdict for Belt Line on the ground that the evidence was legally insufficient to prove that it entered into a civil conspiracy with UTU. The district court submitted the case against UTU to the jury, which awarded a verdict against UTU for $1,570 in consequential damages as compensation for lost wages and $6,000 in punitive damages.

Harrison and UTU have both appealed. Harrison contends that the district court erred in directing a verdict for Belt Line and in refusing to award him attorneys' fees. UTU argues that the evidence was insufficient to show that it breached its duty to represent Harrison, that it cannot be liable for compensatory damages equivalent to Harrison's loss of wages, and that no punitive damages should have been assessed against it.

We think Harrison is correct in his contention that the district court should have awarded him attorneys' fees. However, in all other respects we affirm the district court's judgment.

- 1 -

On the evening of August 18, 1970, Harrison became embroiled in a verbal altercation with a certain Lassiter, an assistant Trainmaster and road foreman of engineers. The discussion was both vehement and blunt. Lassiter wanted to know why Harrison did not call the Yardmaster for orders before the train on which Harrison was a conductor reached the West End Junction in Norfolk, Virginia. Lassiter also told Harrison that a certain brakeman should be lining up switches. Harrison defended his conduct on the first point and asserted that the matter of directing the brakeman's activity was within the discretion of the conductor, to-wit, himself. During the discussion, Lassiter told Harrison several times to be in Lassiter's office at 8:30 a.m. the next morning. Harrison testified, however, that

after conferring with Yardmaster Bowen before the appointed hour, and learning that Bowen would talk to Superintendent Huddle about what had occurred, Harrison did not believe that he was required to go to Lassiter's office at 8:30 a.m. and did not do so. When he attempted to report for work at 4:00 p.m. on August 19, a railroad official told him that he was being held out of service. Harrison immediately communicated with the Chairman of Local 854, who agreed to represent Harrison. Harrison was charged with violation of Rule 427, "insubordination", and Rule 554, "failure to obey the orders of a superior."

The hearing on the charge against Harrison was postponed once so that his case could be properly prepared, but the matter was eventually heard and Harrison was advised in writing that he was suspended without pay for sixty days beginning August 19, 1970, for violating Rules 427 and 554. Harrison's representative filed a claim objecting to the suspension and requesting that Harrison be reinstated and paid for all time lost. This claim was denied and an appeal was taken to the General Committee of Adjustment.

On or about December 21, 1970, a meeting occurred between the UTU General Chairman of the General Committee of Adjustment and F. W. Morrison, President of Belt Line, at which Harrison's claim was discussed. Although the union representative argued that Lassiter's conduct mitigated Harrison's failure to obey the order to be in Lassiter's office, President Morrison concluded to uphold the previous decisions.

According to the terms of the bargaining agreement between Belt Line and the UTU, Harrison or his representative had sixty days in which to file an appeal from the president's decision. On February 11, 1971, a written notice of appeal was given by the union representative (he had recently qualified as General Chairman); and on April 20, 1971, a meeting occurred between the union representative, the chairman of the Local Committee of Adjustment, the superintendent and the Belt Line president. At the meeting, the grievances of Harrison, a certain Howard J. Gray, Jr., and others were discussed. Gray, who had been discharged by the railroad, had a record of numerous violations of the railroad's rules and an arrest and fine for public drunkenness.

Precisely all that was discussed at the meeting is a matter of considerable dispute, but Morrison made a memorandum for his file in which he stated, "Conductor Howard J. Gray, Jr., will be reinstated * * * provided the UTU does not further progress * * * the claim in favor of S. B. Harrison. It was agreed by those in attendance that they would not be progressed until too late to do so account time limit." (Emphasis added.) In violation of the union's constitution and by-laws, Harrison was not advised of the agreement not to "progress" his claim. The reasons for the failure to notify Harrison that his claim would not be "progressed" (appealed to a Public Law Board or the First Division of the National Railroad Adjustment Board) are in dispute. Harrison claims that the failure to notify him was intentional. The UTU claims that it was an accidental oversight. In any event, Harrison's right to pursue his

claim, individually or through a union representative, lapsed, and thereafter he filed this suit.

- II -

We reject Harrison's claim that the district court should have submitted to the jury the question of his right to recover against Belt Line. While Harrison's complaint alleged that his suspension was improper, he did not seek recovery against the railroad on that basis. Rather, he sought relief against Belt Line solely upon the ground that it had participated in a civil conspiracy to deprive him of his right to pursue his grievance. From our reading of the record, we do not find sufficient evidence to put to the jury the question whether Belt Line was a co-conspirator in a civil conspiracy. As we stated in Ross v. Peck Iron & Metal Co., 264 F. 2d 262, 268 (4 Cir. 1959), a civil conspiracy is a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means.

The memorandum of the April 20 meeting may be construed to establish that various grievances of various individuals were "traded", but such a construction does not prove that the railroad breached a duty toward Harrison. Belt Line is under no legal duty to represent its employees; it is free to represent its own interests where they conflict with those of an employee. Nor, as a general rule, is Belt Line required to make certain that the union fairly represents Belt Line's employees. The

case might be a different one if Harrison had proved that Belt Line and UTU acted in concert with the joint motive to discriminate against the employee, as was alleged in Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324 (1969). It might be different also if Belt Line could be charged with knowledge that the UTU was under a duty to give Harrison timely notice that it would no longer represent him and that he must proceed alone, and that in spite of such knowledge the railroad agreed with UTU to breach that duty. [1] In oral argument, however, Harrison's attorneys conceded that the railroad had no knowledge of the union's duty to notify Harrison that it would not "progress" his rights. Without such proof, we cannot conclude that Belt Line conspired to accomplish the lawful objective of sustaining discipline against Harrison by the unlawful means of denying him fair representation of his grievance claims.

UTU, however, could be found to have breached its duty to Harrison. A union must serve the interests of all members without hostility, discrimination, arbitrariness or capriciousness toward any. Although a union may exercise discretion in representing employees, it must act with complete good faith and honesty. This is settled law. Vaca v. Sipes, 386 U.S. 171, 177 (1967); Griffin v.

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1. See, e.g., Ferro v. Railway Express Agency, Inc., 296 F. 2d 847, 851 (2 Cir. 1961).

International Union, UAW, 469 F. 2d 181, 182-83 (4 Cir. 1972). See also Czosek v. O'Mara, 397 U. S. 25 (1970); Woods v. North American Rockwell Corp., 480 F. 2d 644 (10 Cir. 1973); Lewis v. Megna American Corp., 474 F. 2d 560 (6 Cir. 1972); Turner v. Air Transport Dispatchers' Association, 468 F. 2d 297 (5 Cir. 1972); Encima v. Tony Lama Boot Co., 448 F. 2d 1264 (5 Cir. 1971).

In the instant case, we think that the evidence indicates that Harrison's grievance may have had merit. This does not establish that the union's failure to press the grievance was a failure to represent him fairly, but proof of a grievance's merit is circumstantial evidence that the failure to process the claim constituted bad faith. Moreover, the jury could well have concluded from the memorandum of the Belt Line president, Morrison, and the other evidence that Harrison's grievance was arbitrarily relinquished when UTU gave it up to further the grievance of conductor Gray. Finally, the jury could well have found from the conflicting evidence that UTU, in violation of its constitution and by-laws, consciously and intentionally declined to give Harrison timely notice that it would represent him no further and that he must proceed alone. Even if UTU's decision not to further Harrison's claim was reached in good faith, UTU was bound by its constitution and by-laws to notify Harrison so that he could pursue any appeal on his own. Therefore, a conscious decision not to notify Harrison would constitute an arbitrary action in breach of UTU's duty of fair representation. See Cato v. South Atlantic & Gulf

Coast District of I. L. A., 364 F. S. 489, 492 (S. D. Tex. 1973), aff'd, 485 F. 2d 583 (5 Cir. 1973). In short, we find a dual basis on which UTU could properly have been found to have breached its duty to represent Harrison rather than to have exercised in good faith its broad discretion not to assert his rights. See generally Clark, "The Duty of Fair Representation: A Theoretical Structure", 51 Tex. L. Rev. 1119, 1174-77 (1973).

- III -

Upon the facts of this case, we think that the union may be held responsible for compensatory damages and that Harrison is entitled to recover from UTU for his loss of earnings during his suspension from Belt Lines.

In 1972 the Supreme Court, reversing earlier decisions, clearly held that a claim of discharge in violation of a union contract must be processed before the Railroad Adjustment Board. Andrews v. Louisville & Nashville Railroad Company, 406 U. S. 320 (1972). While the Court stated that, very broadly construed, the exhaustion of administrative remedies doctrine might be said to cover what it was doing, the clear implication of the holding and of that part of the opinion is that the Railway Labor Act was construed as providing an exclusive remedy. 406 U. S. at 325. We construed Andrews as holding as much in Dorsey v. Chesapeake & Ohio Railway Company, 476 F. 2d 243 (4 Cir. 1973). Viewed in the light of Andrews, the failure of the union to present the grievance to the

Railroad Adjustment Board within the time allowed extinguished Harrison's right to pursue his claim. Under these circumstances, the union should be responsible to Harrison for the value of the right he lost as a direct result of the union's deliberate misconduct.

We do not think that Czosek v. O'Mara, 397 U.S. 25 (1970), undermines this conclusion from Andrews. In Czosek the plaintiffs, former employees of the Delaware Lackawanna Railroad, claimed that they had been replaced by former employees of the Erie Railroad in violation of the merger agreement. The union allegedly was hostile to the claim throughout with no indication that the plaintiffs were misled into reliance upon union representations that it would protect the plaintiffs' rights. In its opinion, the Court of Appeals for the Second Circuit held that the plaintiffs had lost their contractual claim for lost wages against the railroad because they, without union aid, could have presented their claims to the Railroad Adjustment Board, and, not having done so, the right to enforce such claims against the railroad was lost. O'Mara v. Erie Lackawanna Railroad Co., 407 F. 2d 674 (2 Cir. 1969). The broad statement in the opinion of the Supreme Court that the union should not be required to pay the wage claims but only a sum measured by the additional cost and trouble to which the plaintiffs would have been put in enforcing such claims must be read against that background. There, the plaintiffs had a fair opportunity to procure their own counsel and had they done so, the Supreme Court's statement would indicate the union should be required to reimburse them for the

legal fees and other expense to which the individual plaintiffs had been put. The total economic loss should not have been visited upon the union, for the loss of the right to enforce the contract claim was as much the fault of the individuals as the union's, and the individuals should suffer the consequence of their own inaction when the union had never undertaken to process the grievance. In contrast, Harrison never had a fair opportunity to process the grievance himself or to obtain counsel to represent him. The union had undertaken the handling of the grievance and the right of enforcement was lost because of the union's decision not to process the grievance but to withhold information about its decision from Harrison until the right of access to the Adjustment Board was lost. Here, in contrast to Czosek, the union's conduct has not simply put Harrison to additional trouble and expense; it has extinguished his right of enforcement. The union should respond to the extent of the value of that right, and since there is evidence to support the jury's finding that the value of the right was the economic loss suffered by Harrison as a result of the suspension, it should not be disturbed.

Finally, such cases as Schum v. South Buffalo Railway Company, 496 F. 2d 328 (2 Cir. 1974), deserve mention. In Schum, decided after Andrews, it was held that the employee's right of action against the railroad was not extinguished because of failure to resort to the procedures of the Adjustment Board when the failure was attributable to the union rather than to the individual employee.

Schum, however, appears to us to be inconsistent with the whole theory and purpose of the Act as construed in Andrews. Grievances founded upon contract claims must be presented to the Adjustment Board, and the only right of action in the district courts is for the enforcement of its awards. In fairness, the consequence of the loss of the right of action should not be visited upon the employee, if the loss was not the result of his own conduct. But if the loss results from the deliberately misleading conduct of the union, the union may be held to respond in compensatory damages to him, and there is no reason to stretch the statute to permit the employee's maintenance of an original cause of action against the railroad.

- IV -

We must also reject the contention of UTU that the award of punitive damages should be stricken.

All jurisdictions agree that the purposes of punitive damages are to vindicate the plaintiff, punish the wrongdoer and set an example that the tortious conduct should not be repeated. See Northwestern National Casualty Co. v. McNulty, 307 F. 2d 432, 435-36 (5 Cir. 1962); Adams v. Hunter, 343 F.S. 1284 (D.S.C. 1972), aff'd, 471 F. 2d 648 (4 Cir. 1973). While compensatory damages may to some degree serve the same purposes, it is not unusual in a fair representation suit against a union to find the liability for compensatory damages to be de minimis. St. Clair v. Local No. 515, 422 F. 2d 128, 132 (6 Cir. 1969). Unless punitive damages are available, an employee

may lack the strong legal remedy necessary to protect his right against a union which has either maliciously or in utter disregard of his rights denied him fair representation. The situation is analogous to that present in civil rights actions where the plaintiff's rights are equally important and often equally difficult to enforce without the threat to defendants of liability for punitive damages in an aggravated case. Courts have held in civil rights suits that the "federal common law of damages" is controlling and permits the recovery of exemplary or punitive damages, even in those cases where compensatory damages may be merely nominal. Basista v. Weir, 340 F. 2d 74, 87 (3 Cir. 1965).

UTU contends also that actual malice is necessary for an award of punitive damages. This is the rule in Maryland, for instance, when the alleged tort arises out of contractual relationship. See H & R Block, Inc. v. Testerman, Md. , A. 2d (No. 174, Sept. Term 1974, decided May 26, 1975). Actual malice is usually shown by proof of personal animosity between the parties. The Ninth Circuit has held, however, that in a civil rights suit personal animosity is not "a prerequisite to instructing the jury as to punitive damages or to the granting of such damages." Gill v. Manuel, 488 F. 2d 799, 801 (9 Cir. 1973). Again analogizing the union's duty of fair representation to a constitutional duty, we hold that in the instant case proof of personal animosity or actual malice was not necessary. In telling the jury that it might award punitive damages if it found that UTU acted wantonly or

maliciously or that it acted recklessly or in callous disregard of Harrison's rights, or that Harrison's rights were disregarded with unnecessary harshness or severity, the trial court gave unexceptionable instructions. Therefore, recovery of punitive damages is sustained.

- V -

We think that the district court should have awarded reasonable attorney's fees to Harrison. In Hall v. Cole, 412 U.S. 1 (1973), the Supreme Court affirmed an award of attorney's fees to a union member who successfully sued his union for violation of his free speech rights guaranteed by § 101 (a) (2) of the Labor - Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411 (a) (2). The Court said that "by vindicating his own right of free speech * * * [the plaintiff] necessarily rendered a substantial service to his union as an institution and to all of its members." 412 U.S. at 8. Therefore, it was appropriate for all of the members, through the union, to pay the attorney's fees of the plaintiff.

Harrison's suit also vindicates a right shared by all members of his union: the right to fair representation of each individual's claims against the employer. See generally Clark, "The Duty of Fair Representation: A Theoretical Structure", 51 Tex. L. Rev. 1119, 1174-77 (1973). We think that application of Hall therefore compels an award of attorney's

fees to Harrison.[2] The amount, of course, is within the discretion of the district court.

- VI -

Aside from the issue of attorney's fees, the judgment of the district court is affirmed. The case will be remanded for the allowance of reasonable attorney's fees for the representation of Harrison in the district court and here.

MODIFIED and AFFIRMED
and REMANDED.

WINTER, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the district court correctly directed a verdict for Belt Line,

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2. Just as the common-benefit theory applies in the instant case, so it is not relevant when the imposition of attorney's fees on the defendant will not have the effect of making the beneficiaries of the suit pay for some of the litigation costs. See e.g., the Court of Appeals' rejection of the common-benefit theory in Wilderness Society v. Morton, 495 F. 2d 1026, 1029 (D. C. Cir. 1974, reversed as to application of the "private attorney general" doctrine, Alyeska Pipeline Service Co. v. Wilderness Society, ____ U. S. ____ (May 12, 1975).

that Harrison's recovery of $6,000 in punitive damages should be sustained, and that the district court should be directed to allow Harrison counsel fees. Accordingly, I concur in Parts I, II, IV and V of the majority opinion. In the light of Vaca v. Sipes, 386 U.S. 171 (1967), and Czosek v. O'Mara, 397 U.S. 25 (1970), I am unable to conclude that Harrison's recovery for lost earnings can be sustained and I therefore respectfully dissent from Part III.

Vaca was a suit by a union member against the union alleging, inter alia, that he had been improperly discharged by his employer and that the union had arbitrarily refused to take his grievance to arbitration. While the Court held that, on the facts, arbitrary or bad faith conduct on the part of the union in processing the grievance had not been shown, the Court also held that "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach." 386 U.S. at 195. Both a decree compelling arbitration and damages were mentioned as possible remedies. But the Court held that the union could not properly be held liable for those damages which are attributable solely to the employee's allegedly wrongful discharge:

> [M]ay an award against a union include, as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract

> which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer . . . . With the employee assured of direct recovery from the employer, we see no merit in requiring the union to pay the employer's share of the damages. (Footnote eliminated.) 386 U.S. at 197.

Of course, in Vaca the employer was not a railroad and was subject to the provisions of the National Labor Relations Act and the Labor Management Relations Act. Harrison contends that the employee was not permitted to recover loss of earnings from the union in Vaca because the employee had a remedy against the employer under these Acts. In the instant case, the argument runs, the employer is a railroad and the provisions of the Railway Labor Act do not give a railroad employee a similar right of action for loss of wages against his employer; therefore, Vaca does not bar his recovery of lost wages from the union.

Czosek, however, answers Harrison's argument. It was a case in which employees of a railroad sought damages against the railroad and the union. The employees alleged that they had been wrongfully discharged by the railroad and that the union had been "guilty of gross nonfeasance and hostile discrimination" in refusing to press their claims. The district court dismissed the railroad for failure to exhaust administrative remedies and lack of diversity jurisdiction. In this respect,

the Court of Appeals affirmed, but ordered that on remand plaintiffs be given the right to amend their complaint if they wished to allege "that the employer was implicated in the union's discrimination." The district court also dismissed the claim against the union, but the Court of Appeals reversed.

In the Supreme Court, the union challenged dismissal of the complaint against the railroad; evidently it feared that it might be held liable for damages inflicted by the employer. But the Court held that even if the railroad were not joined, judgment against the union could be had only for those damages that flowed from its conduct:

> Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer. 397 U. S. at 29.

The majority asserts that, strictly viewed on its facts, the holding and language of Czosek do not answer Harrison's contention. I cannot agree. The flat language of the Czosek opinion can be searched in vain for any suggestion that it was predicated on recognition that the employees had an independent right to recover lost wages from the railroad. By its

interpretation of Andrews v. Louisville & Nashville Railroad Company, 406 U.S. 320 (1972), the majority impliedly holds that Andrews overruled Czosek sub silentio. I see no warrant for this view. Andrews, too, can be searched in vain for any language indicating that Andrews was intended to have that effect. Moreover, the majority's conclusion also flies in the teeth of the rationale of Vaca that, in an alleged wrongful discharge case, it is the employer's breach of the contract of employment which gives rise to the loss of wages, not the union's failure properly to press the claim.

My view that Harrison ought not to recover loss of earnings might seem harsh if employees in Harrison's situation could not win compensation from employers on meritorious breach of contract claims. The question is not directly before us, since Harrison has neither expressly alleged nor pressed a claim of wrongful suspension against Belt Line. But if Harrison's failure to press such a claim is not a sufficient reason to justify the majority's departure from the exact language of Vaca and Czosek, I add that I am persuaded that in a proper case the means for making such a claim do exist. If an employee covered by the Railway Labor Act has an independent contract claim against his employer, the appropriate initial forum is generally the Adjustment Board. Andrews v. Louisville

& Nashville R. R. Co., supra.[1] Where this forum is closed to the employee because of his union's breach of the duty of fair representation, the employee is not precluded from suing the employer. See Schum v. South Buffalo Rwy. Co., 496 F. 2d 328 (2 Cir. 1974).[2]

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1. But see Conrad v. Delta Air Lines, Inc., 494 F. 2d 914, 918 (2 Cir. 1974), which held Andrews applies only where the dispute stems "from differing interpretations of the collective-bargaining agreement," Andrews v. Louisville & Nashville R. R. Co., 406 U.S. at 324, and not where the employee's claim "rests upon a charge" that the employer violated the Railway Labor Act itself.

2. It is also possible that "when a single series of events gives rise to claims against the employer for breach of contract and against the union for breach of the duty of fair representation," the employee may not be required to take his claim against the employer to the Adjustment Board, even if the Board is open to him. The Supreme Court specifically reserved this question in Czosek v. O'Mara, 397 U.S. 25, 30 (1970). Andrews does not necessarily provide the answer. I think that Schum was correctly decided.

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"To leave the employee remediless in such circumstances would . . . be a great injustice." Vaca v. Sipes, supra, 386 U.S. at 185-86. Federal jurisdiction for the fair representation claim against the union exists under 28 U.S.C. § 1337. Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 213 (1944). The employee's independent claim against the employer may be treated as pendent to the claim against the union.[3] Other grounds of jurisdiction for the claim against the employer may also exist.

In any event, to my mind Czosek dictates that Harrison cannot recover loss of earnings for his suspension from the railroad. He did not allege that the union "affirmatively caused the employer to commit the alleged breach of contract." Vaca, 386 U.S. at 197 n. 18. Nor does the record contain any evidence that UTU played any part in Belt Line's decision to suspend Harrison. And since he has not sought

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3. See Leather's Best, Inc. v. S.S. Mormaclynx, 451 F. 2d 800 (2 Cir. 1971); Stone v. Stone, 405 F. 2d 94 (4 Cir. 1968), holding that if there is federal jurisdiction against one party, pendent jursidiction may bring in a closely related state claim against another party. But see the restrained discussion of this point in Moor v. County of Alameda, 411 U.S. 693, 713-15 (1973). See generally UMW v. Gibbs, 383 U.S. 715 (1966); 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3567 at 439-62.

to recover damages from Belt Line for wrongful discharge, he can hardly claim that the union increased the difficulty and expense of recovery of such damages.

I conclude that the only compensatory damages that Harrison may recover from UTU are those caused directly by the union's failure to afford him good faith representation. But Harrison has not proved any special damages resulting from the union's breach of duty. At most, his consequential damages are only nominal. If only nominal, I would not grant him or UTU a new trial; I would simply direct that this portion of the judgment be reduced to $1.00.

While I agree with the majority in sustaining Harrison's recovery of punitive damages, in view of the factthat I would reverse or drastically reduce, his recovery of compensatory damages, I should add a word about why I would reject UTU's argument, in reliance of the law of Virginia, that punitive damages may not be awarded when there is no recovery of compensatory damages. The short answer is that while state law may sometimes provide useful guides in adjudicating federal rights, Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191, 199-200 (4 Cir. 1963), a case like the instant one should be decided by the "federal law which the courts must fashion from the policy of our national labor laws." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957). Accordingly, I think that the majority is fully justified in fashioning a federal common law of damages to sustain Harrison's recovery of punitive damages.

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IN THE

Supreme Court of the United States

October Term, 1976

NO 75-1204

UNITED TRANSPORTATION UNION,
Petitioner,

v.

SEYMON B. HARRISON
and
NORFOLK AND PORTSMOUTH BELT LINE
RAILROAD COMPANY,
Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent, Seymon B. Harrison, hereby files its brief in opposition to the petition of the United Transportation Union.

QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the decision of the United States District Court awarding the respondent compensatory damages and properly reversed the decision of the United States District Court denying respondent attorney's fees.

STATEMENT OF THE CASE

Respondent agrees with petitioner's Statement of the Material Proceedings. Respondent adopts as its Statement of the Facts those set forth in the written opinion of the Fourth Circuit Court of Appeals (petitioner's Appendix, 5A-8A), adding only the following.

As a result of the union's failure to advise Harrison that his grievance was not going to be "progressed" by the union, Harrison lost his right under the union constitution to appeal within the Union.

Respondent has included in this brief, as a one page Appendix, the memorandum of the railroad's President, F. S. Morrison dated April 20, 1971.

ARGUMENT

1. THE DECISION BELOW WITH REGARD TO THE AWARD OF COMPENSATORY DAMAGES DOES NOT CONFLICT WITH THE PRIOR DECISION OF THE COURT BUT IS CONSISTENT THEREWITH

The Court below held that the union, having intentionally denied respondent his remedy to contest a wrongful suspension, must compensate him for earnings lost during the suspension.

The petition argues that the decision below misconstrues this Court's rulings in Vaca v. Sipes, 386 U.S. 171 (1967), and Czosek v. O'Mara, 397 U.S. 25 (1970). Its argument fails to recognize the particular circumstances of the instant case; factors that establish Vaca and Czosek as cases strongly supportive of the decision below.

The court below placed the grievance in proper perspective stating that, ". . . proof of a grievance's merits is circumstantial evidence that the failure to process the claim constituted bad faith" (Appendix 10A). The jury found that the union intentionally misled Harrison as to his rights under the collective bargaining agreement. By its concealment the union also denied Harrison as to his right under the union

constitution. Two contractual obligations were intentionally ignored.

Harrison's claim that the railroad was implicated in the union's breach of the duty of fair representation after the suspension was rejected by the lower court. This case concerns solely the union's breach of its duty in preventing a determination as to whether the railroad's conduct was wrongful and in denying Harrison's right under the Union Constitution.

In neither Vaca nor Czosek were the union members misled as to their access to the grievance procedures. The plaintiffs in both cases knew what action their unions had taken. Further it was assumed in each that the employer's conduct was a breach of the collective bargaining agreement and that liability could be established in that quarter.

The question posed in Vaca, cited in petitioner's brief at page 8, was, "May an award against a Union include, as it did here, damages attributable solely to the employer's breach of contract?" In Czosek the court stated:

> "Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the Union and a subsequent discriminatory refusal by the Union to process grievances based on the discharge, damages against the Union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance added to the

difficulty and expense of the employer." See Czosek v. O'Mara, supra 29. (Emphasis added).

If, in the present case, the employer were ultimately proven free of wrongful conduct, would the union's conduct in intentionally denying Harrison access to the grievance process be less reprehensible?

The Court's decision in Vaca applied to the facts of this case stands for the principle that a union member may not be denied fair representation and that in cases where it is denied the federal courts must fashion remedies appropriate to the circumstances presented. Czosek, also supports the right to fair representation but adds, that in appropriate cases, the union member litigants should be awarded their costs incurred in vindicating the right including attorney's fees; a question discussed below.

Schum v. South Buffalo Railway Co., 496 F.2d 328 (2d Cir. 1974) is described by the Court below as "inconsistent" with the decision in Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972). Schum is an exhaustion of remedies case in the tradition of Glover v. St. Louis - San Francisco R. Co., 393 U.S. 324 (1969) which holds that the union member has direct access to the courts where the union breachs its duty of fair representation.

The Schum decision however is not properly applied to the instant case where a union member has been deliberately mis-

led as to his rights. Assume again that Harrison had sought a recovery against the railroad and the court had found his suspension proper. Would no recovery lie against the union which denied access to established channels? To so rule would lend the Court's approval to the future improper concealment of union decisions.

In Vaca v. Sipes, supra, this Court stated that the gravemen of a breach of the duty of representation case is not the relative merits of the grievance but the manner in which it is handled. The very basis for denying an employee absolute control over his grievance is his absolute right to fair representation. This right should not be dependant on proof that the employer's activities were improper.

The union's obligation being absolute should not its intentional abandonment be at the union's cost? The union deprived Harrison of its expertise as well as the relatively smooth, established grievance procedures of the collective bargaining agreement. That being established, must he now prove not only the breach of the union's absolute duty to fairly represent him but also the merit of the grievance in order to be made whole?

To insist on such a procedure is to place an incredible burden on the employee. Fellow workers, reluctant witnesses, at best, have to be called to testify against their employer. The litigation is protracted, expensive and, in most cases, involves relatively small sums of money. (It is easily understood why most report-

ed breach of representation cases concern discharges.)

Respondent submits that if Vaca is read as requiring proof of the employer's breach in order for an employee to recover his lost wages it is contradictory. So also is Czosek; "The claim against the union defendants for their breach of their duty of fair representation is a discrete claim quite apart from the right of individual employee expressly extended to them under the Railway Labor Act to pursue their employer before the Adjustment Board." Id at 28.

Where a union intentionally conceals, and thus deprives, a member of his absolute rights it should compensate him for the value of the right lost; in this case the loss of wages during suspension.

The Fourth Circuit has expressly upheld jury awards of compensatory damages assessed solely against a union because it breached its duty of representation. Griffin v. International Union, United Automobile A. & A.I.W., 496 F.2d 181 (4th Cir. 1972); Thompson v. Brotherhood of Sleeping Car Porters, 367 F.2d 489 (4th Cir. 1966).

The Railway Labor Act establishes the union's duty to properly represent its members and to that extent it is federal legislation designed to protect the civil rights of a particular class. The Fourth Circuit has carried its clear meaning beyond the limitation of racial discrimination. Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191

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(4th Cir. 19630; Hostetler v. Brotherhood of Railroad Trainmen, 287 F.2d 457 (4th Cir. 1961).

In Sullivan v. Little Hunting Park, 396 U.S. 229,239, 24 L.Ed.2d 386, 393-394 (1969), the Supreme Court spoke to the question of damages where federally created rights are impaired quoting the case of Bell v. Hood, 327 U.S. 678, 90 L.Ed. 939 (1946) as follows:

> "(W)here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal court may use any available remedy to make good the wrong done." (Id., at 684, 90 L.Ed. 944).

The Court further stated: "Compensatory damages for deprivation of a federal right are governed by a federal standards, as provided by Congress in 42 USC §1988, . . ."

In Thompson v. Brotherhood of Sleeping Car Porters, 367 F.2d 489 (4th Cir. 1966), the Court found that the District Court did not abuse its discretion in refusing to set aside the jury verdict as to damages. Referring to Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 1 L.Ed. 972

(1956), the Court stated:

> Lincoln Mill mandates the federal courts to fashion effective remedies for the impairment of federally created rights in the field of labor relations. Since neither plaintiff nor the defendant saw fit to make the railroad a party to this action, the only effective remedy is a damage award for the for the loss of past and future earnings. (Emphasis added).

An award of compensatory and punitive damages was the only effective remedy in this case and was proper under the particular curcumstances presented.

2. AN AWARD OF ATTORNEY'S FEES UNDER THE "COMMON BENEFIT" THEORY IS PROPER IN A SUIT ALLEGING A BREACH OF THE DUTY OF FAIR REPRESENTATION.

The general rule that attorney's fees are not allowed where there is no statutory or contractual authority therefore is subject to several exceptions. These include cases where an award will benefit a large identifiable class of people. Brewer v. School Board of Norfolk, 456 F.2d 943, 948-949 (4th Cir. 1972). The actual recovery of a fund is not a prerequisite to the award of attorney's fees to a successful litigant.

Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1960).

The Court of Appeals in the present case based its decision as to attorney's fees on the common benefit theory. (Appendix 16A-17A). As in the case of Hall v. Cole, 412 U.S. 1 (1973), Harrison's action vindicates a right common to all members of his union.

In United States Steelworkers of America v. Butler Manufacturing Co., 439 F.2d 1110, 1112-1113 (8th Cir. 1971), a suit under §301(a) of the Labor Management Relations Act, 1947, 29 U.S.C.A §185(a), the court said that award of attorney's fees, "constitutes an appropriate item of damage to be awarded by courts in the enforcement of national labor policy." The Court in Butler characterized such damages as compensatory rather than punitive.

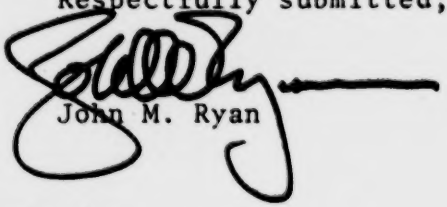
Attorney's fees have been expressly allowed in cases involving a breach of the duty of fair representation. Rolax v. Atlantic Coast Line R. Co., 186 F.2d 483 (4th Cir. 1951); Tedford v. Peabody Coal Co., 383 F.Supp. 787 (N.D.Ala. 1974). And they clearly fall within that category of damages described in Vaca v. Sipes, 386 U.S. 171, (1967), as representing the added expense, "caused by the union's refusal to process the grievance." Id. at 197-198.

Regardless of whether the jury's award of damages for wages lost during suspension is upheld the award of attorney's fees as compensatory damages clearly supports the assessment of punitive damages.

CONCLUSION

Respondent submits that the decision of the Fourth United States Court of Appeals herein was consistent with existing Federal law and that the award of attorney's fees was proper. Respondent urges the Court to deny the Petition for Certiorari filed herein.

Respectfully submitted,



John M. Ryan

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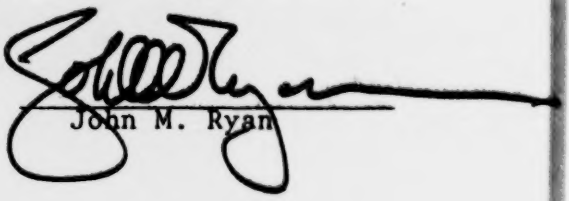
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the Brief in Opposition to Petition for a Writ of Certiorari in the case of United Transportation Union v. Seymon B. Harrison and Norfolk and Portsmouth Belt Line Railroad Company were mailed to Raymond H. Strople, Esquire, Moody, McMurran and Miller, Ltd., Post Office Box 1138, Portsmouth, Virginia 23705, counsel of record for Petitioner and delivered to William E. Rachels, Jr., Esquire, 1800 Virginia National Bank Building, One Commercial Place, Norfolk, Virginia 23510, counsel

of record for the Norfolk and Portsmouth Belt Line Railroad Company, on the 8th day of April, 1976. It is further stated that the petition has been served on all parties.



John M. Ryan

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY
220 LAW BUILDING
NORFOLK, VIRGINIA 23510

F. F. MORRISON
PRESIDENT AND GENERAL MANAGER

April 20, 1971

MEMORAKDUM FOR FILE:

Conference was held in my office commencing at 10:00 A.M., on Tuesday, April 20, 1971, with the following in attendance:

C. C. Harrel, Jr., Vice General Chairman, United Transportation Union (T)
E. G. Reitz, Local Chairman, United Transportation Union (T)-Local 854
Mr. M. E. Huddle, Superintendent, N&PBL Railroad Company
F. F. Morrison, President and General Manager, N&PBL Railroad Company

The primary purpose of this conference was to meet and become acquainted with Mr. Harrell who has generally been assigned by the UTU to handle matters pertaining to UTU represented employees in yard service. However, the following claims or grievances were discussed in some detail and disposed of as follows:

Conductor Howard J. Gray, Jr., will be reinstated to service with seniority and vacation rights unimpaired but without pay for lost time provided the UTU does not further progress thei claims in favor of S. B. Harrison, (UTU file 7389-854-letter dated 2-11-1971), J. B. Harrison, (UTU File 7388-854, letter February 12, 1971). It was agreed by those in attendance that they would not be progressed until too late to do so account time limit.

Mr. Harrell and the undersigned also discussed the status of Brakeman J. J. Wood who is presently being held out of service due to physical disqualification by our company physician Dr. Alex T. Mayo. Mr. Harrell advised that Mr. Wood no longer wishes to be represented by the UTU in the handling of this matter and any further handling would be the responsibility of Mr. Wood.

Conference was adjourned at approximately 10:45 A. M.

F. F. Morrison
President and General Manager

FSM:hcp

cc: Personal file: S. B. Harrison
J. B. Harrison
J. J. Wood

P/T* 10